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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.498 of 2003

Ramprasad @ Chotelal Choubey & another

- Versus -

State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
L.C.BHADOO
Judge

HON'BLE MR. JUSTICE SUNIL KUMAR SINHA

Sd/-
Sunil Kumar Sinha
Judge
30-9-2007

POST FOR PRONOUNCEMENT OF JUDGMENT ON 1st OCTOBER, 2007

Sd/-
L.C.BHADOO
Judge

(49)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.498 of 2003

APPELLANTS:
(In Jail)

1. Ramprasad @ Chotelal Choubey, aged 45 years, S/o Richan Ram.
2. Dilraj Kumari, aged 44 years, W/o Ramprasad Choubey.

Both R/o Kachani, P.S. Bedhan, Distt. Sidhi, At present R/o Tugawa, Chouki Balangi, P.S. Chandni, Distt. Sarguja, Chhattisgarh.

- Versus -

RESPONDENT:

State of Chhattisgarh

{Appeal under Section 374 of the Code of Criminal Procedure}

Appearance:

Mrs. Savita Tiwari, counsel for the appellants.

Mr. Ashish Shukla, Additional Public Prosecutor for the State/respondent.

Division Bench: Hon'ble Mr. L.C. Bhadoo and Hon'ble Mr. Sunil Kumar Sinha, JJ.

JUDGMENT

(Delivered on 1st October, 2007)

The following judgment of the Court was delivered by **L.C. Bhadoo, J.**: -

1. The appellants namely, Ramprasad & Dilraj Kumari, father & step-mother of Miss Sonu Kumari (since deceased) faced trial before the 6th Additional Sessions Judge, Fast Track Court, Surajpur in Sessions Trial No.119/2001 for commission of offence under Section 302 read with Section 34 of the I.P.C. for committing the murder of their daughter Miss Sonu Kumari. Learned trial Court vide its judgment dated 22-7-2002 held that based on the circumstantial evidence and facts and circumstances, it is established that the appellants committed the murder of their daughter Miss Sonu Kumari in the intervening night of 7-1-2001 & 8-1-2001 in their room and sentenced each of the accused to undergo imprisonment for life.

2. Case of the prosecution, in brief, is that in the intervening night of 7-1-2001 & 8-1-2001 the accused/appellants along with their daughter Miss Sonu Kumari, aged about 13 years, were sleeping in their room. In the morning of 8-1-2001 when door was not opened by the accused persons, Jagatram, owner of the house, knocked the door and called the accused persons, but the accused persons did not responded to the call of Jagatram, therefore, Jagatram called neighbours and they advised him to inform the Police. Jagatram gave report Ex.P-5 in Police Outpost: Balangi of Police Station: Chandni, District: Sarguja. Receiving the report, R.B. Pandey (PW-7), Assistant Sub Inspector of Police, came on the spot and knocked the door. The accused inquired from inside as to who is knocking the door, R.B. Pandey said that he is Sarpanch of the Village, whereupon the door was opened. They saw that the accused persons were present inside the room and dead body of Miss Sonu Kumari was lying on the cot.

3. After giving notice Ex.P-1 to the Panchas, R.B. Pandey (PW-7) prepared inquest Ex.P-2 on the body of Miss Sonu Kumari. He seized the vomiting substance of Miss Sonu Kumari in a plastic container and also the Salwar smeared with stool of the deceased under Ex.P-3. He sent the body of Sonu Kumari to Primary Health Centre, Wadrafnagar under Ex.P-7 for post-mortem where Dr. M.K. Manhar (PW-9), conducted post-mortem and opined that cause of death of Sonu Kumari was due to asphyxia as a result of throttling and death was homicidal in nature. He prepared post-mortem report Ex.P-13. The Station House Officer, Police Station: Chandni was informed, whereupon he registered first information reports Exs.P-9 & P-10.

4. The accused persons were arrested and after completion of investigation charge sheet was filed against the accused persons in the Court of Judicial Magistrate, First Class, Surajpur, who in turn committed the case to the Sessions Judge, Sarguja, from where learned 6th Additional Sessions Judge, Fast Track Court, Surajpur, received the case on transfer for trial.

5. The prosecution in order to establish charge against the accused persons examined nine witnesses. Statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which accused Ramprasad denied the material appearing against him. Even regarding inquest report and seizure of articles from the place of occurrence he pleaded ignorance,

however, he has admitted that Sonu Kumari was residing with them in their room. He further stated that he was not present in the room and in the last he stated that he has been falsely implicated in the crime on account of animosity and further stated that he was on duty in the Nursery of Forest Department, in the night, he stayed there only. Accused Dilraj Kumari has also given similar statement and stated that Jagatram has falsely implicated her in the crime.

6. Learned Additional Sessions Judge after hearing counsel for respective parties, convicted and sentenced the accused persons as aforementioned.

7. We have heard Mrs. Savita Tiwari, learned counsel for the appellants and Mr. Ashish Shukla, learned Additional Public Prosecutor for the State/ respondent.

8. Learned counsel for the appellants argued that in this case there is no evidence that the accused persons committed the murder of their daughter. Accused Ramprasad was not in the room in the fateful night and Sonu Kumari died on account of ailment that is why she vomited before her death.

9. On the other hand, learned Additional Public Prosecutor supported the judgment of the trial Court.

10. Now, the question is whether the death of Sonu Kumari was homicidal. In this connection, Dr. M.K. Manhar (PW-9), who conducted post-mortem on the body of Sonu Kumari, has stated in his evidence that on 10-1-2001 he conducted post-mortem on the body of Sonu Kumari, clotted blood was present on nostrils of the deceased, eyes were open, pupils were dilated, there was swelling on the face, saliva was present on the mouth in dried position, there were marks of abrasion in front of neck red in colour, there were abrasions on both shoulders, there were abrasions below left elbow & wrist, nails were blue and stool passed through the anus. On dissection of neck, ecchymosis was present, windpipe was pressed and clotted blood was present. Injuries on the body of Sonu Kumari were ante-mortem in nature and in his opinion cause of death was asphyxia. Death was homicidal in nature. In cross-examination, he has specifically denied that it is incorrect to say that the death was on account of obstruction in windpipe, there was blood in lumen of larynges and on account of that there was obstruction in breathing. It is correct to say that death was due to lumen of larynges. In cross-examination of this witness defence has

not been able to elicit any circumstance, which suggests that the death of Sonu Kumari was not homicidal. Defence has not been able to elicit any circumstance from the doctor that there was any obstruction in the windpipe. Apart from pressing of neck, injuries were present on front side of neck and on shoulders, which suggest that Sonu Kumari was manhandled before her death and that is why she sustained injuries. The accused persons have not given any explanation that how Sonu Kumari, when she was sleeping with them, sustained those injuries. Therefore, based on the above circumstantial evidence as also the opinion of the doctor, it is established that the death of Sonu Kumari was homicidal in nature.

11. As far as complicity of the accused persons in the crime in question is concerned, there is no direct or ocular evidence in this case regarding complicity of the accused persons in the crime in question. Case rests on the circumstantial evidence. In order to connect the accused with the crime in question based on the circumstantial evidence, the prosecution is required to establish complete chain of the circumstantial evidence. In the matter of **Dhananjoy Chatterjee vs. State of W.B.**[1] the Apex Court held that:

> "In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

12. In the matter of **Sharad Birdhichand Sarda vs. State of Maharashtra**[2], the Apex Court while dealing with circumstantial evidence, held thus: -

> "Onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before

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[1] (1994) 2 SCC 220
[2] AIR 1984 SC 1622

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conviction could be based on circumstantial evidence, must be fully established. They are:- (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established. (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; (3) the circumstances should be of a conclusive nature and tendency; (4) they should exclude every possible hypothesis except the one to be proved; and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

13. In the present case, the prosecution has tried to establish crime against the accused persons on the following circumstances: -

(i) that, in the intervening night of 7-1-2001 & 8-1-2001 the accused/ appellants along with deceased Sonu Kumari were sleeping in the room, in the morning of 8-1-2001, door was not opened by the accused persons, therefore, owner of the house Jagatram (PW-4) knocked the door and called the accused persons, even then, they did not respond, in the circumstances, Jagatram called the villagers, they also called the accused persons, but the accused persons did not respond, thereafter, Jagatram informed to Police Outpost: Balangi from where R.B. Pandey (PW-7), A.S.I., came on the spot and knocked the door, on his call, accused Ramprasad opened the door and they saw that accused Ram Prasad & Dilraj Kumari were present inside the room and body of Sonu Kumari was lying on the cot; and

(ii) that, Sonu Kumari met with homicidal death in the intervening night of 7-1-2001 & 8-1-2001 in the room where the accused/ appellants were sleeping along with Sonu Kumari and the appellants have not offered any explanation regarding the injuries sustained by Sonu Kumari and about the homicidal death of Sonu Kumari.

14. As far as the first circumstance is concerned, Jagatram (PW-4) has stated in his evidence that accused Ramprasad & Dilraj Kumari along with their daughter Sonu Kumari were residing in one room of his house, which was given to them on rent. In the fateful night, the accused persons along

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with Sonu Kumari went for sleep, next day morning at about 8-9 a.m. when the door was not opened, he called the accused persons, but they did not respond to his call, therefore, he called the neighbours, they also called the accused persons, but even then, the accused persons did not open the door, as such, on the advise of neighbours, he went to the Police Outpost and gave report Ex.P-5. Thereafter, Police people came with him, they called the accused persons on which accused Ramprasad inquired from inside as to who is calling, on which the Assistant Sub Inspector said that he is Sarpanch of the village why he is not opening the door, therefore, Ramprasad opened the door and came out. On inquiry by the A.S.I., Ramprasad replied that after taking food they went for sleep. The A.S.I. enquired about the wife of accused Ramprasad, then he said that she is inside, when they entered inside, Dilraj Kumari was present inside the room and dead body of Sonu Kumari was lying in the room covered with a cloth.

15. Jirmati Bai (PW-5), wife of Jagatram (PW-4), has also stated in her evidence that the accused persons and Sonu Kumari were residing in their room on rent, Sonu Kumari was step-daughter of accused Dilraj Kumari, at times Dilraj Kumari used to give beating to Sonu Kumari. In the morning when they did not open the door, the door was knocked, even then the door was not opened, therefore, she informed her husband Jagatram & villagers, even then they did not open the door, hence, Balangi Police Outpost was informed from where the Police people came and on their asking, the door was opened, accused Ramprasad came out, however, accused Dilraj Kumari remained inside, thereafter, the Police went inside, the body of Sonu Kumari was taken out by the Police and papers were prepared.

16. R.B. Pandey (PW-7), A.S.I., has also stated in his evidence that on the fateful day he was working as A.S.I. in Police Chowki: Balangi, Jagatpal Ram gave report Ex.P-5, he went on the spot and seized the vomiting substance mixed with blood and one Salwar smeared with stool under Ex.P-3. He has further stated that on receiving the information he went on the spot and after getting open the door, Panchnama was prepared and doctor was called on the spot, post-mortem was conducted by the doctor.

17. In cross-examination of these three witnesses (PW-4, PW-5 & PW-7), defence has not been able to elicit any circumstance, which may discredit the evidence of these three witnesses. Jagatram (PW-4) & Jirmati Bai

(PW-5), wife of Jagatram, are independent witnesses in whose house the accused persons were residing on rent. Even though it has been stated that the witnesses have deposed against the accused persons on account of animosity, but this is the bald allegation levelled by the accused persons in their statements under Section 313 of the Cr.P.C. They have not stated what was the reason of animosity. Jagatram (PW-4) & Jirmati Bai (PW-5) are independent witnesses and there was no reason or rhyme for these witnesses to implicate the accused persons in a false case that too for the murder of their own daughter.

18. Even though defence has been raised that accused Ramprasad went on duty in the Nursery of Forest Department, on the fateful night he stayed back in the Nursery itself and he was not present in the room, but to substantiate this defence, the accused persons have not been able to adduce any evidence of departmental persons or any other person that in fact accused Ramprasad was at the Nursery of Forest Department in the night. On the contrary, there is clear, cogent and impeccable evidence of Jagatram (PW-4) & Jirmati Bai (PW-5) that accused persons Ramprasad & Dilraj Kumari both were inside the room, they did not open the room, therefore, Police were called and when Police came, then only Ramprasad opened the door, both Ramprasad & Dilraj Kumari were present in the room and dead body of Sonu Kumari was lying in the room. R.B. Pandey (PW-7) has also stated in his evidence that report Ex.P-5 was lodged by Jagatram, thereafter, he went on the spot and after getting open the door of the room, Panchnama on the dead body was prepared. Perusal of inquest report Ex.P-2 also shows that the accused persons did not open the door on 8-1-2001, therefore, Police people were called and in presence of Ramprasad Choubey the door was opened.

19. From the above evidence, it is established that in the intervening night of 7-1-2001 & 8-1-2001, Sonu Kumari was murdered by throttling in the room of the accused persons. The accused persons have not come forward with a probable explanation that how Sonu Kumari sustained injuries and how she met with homicidal death. On the contrary, in their statements recorded under Section 313 of the Cr.P.C., they have given false explanation regarding presence of accused Ramprasad that in the fateful night he was in the Nursery of Forest Department which has been found false, because in the morning when the door was opened by Ramprasad himself, the dead body of Sonu Kumari was lying inside the

room and accused Dilraj Kumari was also present inside the room. As the accused persons were inside the room when the door was opened, they have not offered any explanation as to why the door was not opened. In the first instance, Jagatram called the accused, thereafter, the villagers called the accused, but ultimately accused Ramprasad opened the door only when the Police came and called. Therefore, the accused persons were within the special knowledge and acquainted with the manner in which Sonu Kumari met with homicidal death and how she sustained injuries. In this connection, Section 106 of the Indian Evidence Act is relevant which envisages that if any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The principle underlying Section 106 is an exception to the general rule governing burden of proof applies only to such matters of defence which are supposed to be especially within the knowledge of the party concerned. The first exception to this general rule is when there is a presumption either of fact or of law one way or the other, then arises the second exception embodied in Section 106. If a fact is within the special knowledge of a party, it is futile to force the other party to prove it. Such proof can be affirmative or negative in character. We are conscious of the fact that Section 106 is certainly not intended to relieve the prosecution of its initial onus that the prosecution has to stand on its own leg.

But in such house murder cases which are committed inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in the circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, is insisted upon by the Courts. Initially burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation. In case of no explanation or false

explanation it would become an additional link in chain of circumstances, as has been held by the Apex Court in the matter of **Trimukh Maroti Kirkan vs. State of Maharashtra**[3].

21. Similar view has been taken by the Apex Court in the matter of **Ram Gulam Chaudhary and others vs. State of Bihar**[4] and while interpreting Section 106 of the Evidence Act the Court held that

> "In the absence of an explanation, and considering the fact that the appellants were suspecting the boy to have kidnapped and killed the child of the family of the appellants, it was for the appellants to have explained what they did with him after they took him away. When the abductors withheld that information from the court, there is every justification for drawing the inference that they had murdered the boy. Even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The appellants by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference."

22. No explanation has been offered by the appellants as to how Sonu Kumari sustained injuries and how she met with homicidal death. Post-mortem report and medical evidence are suggestive of the fact that Sonu Kumari was throttled as a result of which she died. Therefore, this is an additional factor raising inference against the accused persons that they were culprits in the murder of Sonu Kumari.

23. Learned counsel for the appellants further argued that in this case both father & step-mother of the deceased have been roped in and there is no evidence whether both of them have strangulated the deceased or involved in the crime or any one of them infact strangulated.

24. The accused persons have been convicted under Section 302 of the I.P.C. with the aid of Section 34 of the I.P.C. No premeditation or previous meeting of mind is necessary for the applicability of Section 34 of the I.P.C. The existence of common intention can be inferred from the attending circumstances of the case and the conduct of the parties. No direct evidence of common intention is necessary. For the purposes of

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[3] 2006 AIR SCW 5300
[4] JT 2001 (8) SC 110

common intention even the participation in the commission of the offence need not be proved in all cases. The common intention can develop even during the course of an occurrence.

25. In the matter of **Girija Shankar vs. State of U.P.**[5] the Apex Court held that

> "Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true concept of Section 34 is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. The existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision."

26. The Apex Court in the matter of **Maqsoodan and others vs. State of U.P.**[6] held that "common intention is a question of fact. It is subjective. But it can be inferred from facts and circumstances".

27. In the light of the above principles, if we scrutinize the facts and circumstances of the present case, it is admitted position that Sonu Kumari, aged about 13 years, was daughter of accused Ramprasad from his previous wife and co-accused Dilraj Kumari is Ramprasad's second wife. Jirmati Bai (PW-5), landlady, has categorically stated in para 2 of

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[5] 2004 AIR SCW 810
[6] AIR 1983 SC 126

her evidence that the accused persons along with Sonu Kumari were residing in their house on rent and at times, Dilraj Kumari used to beat Sonu Kumari. Further, as per the medical evidence, injuries are found on the body of Sonu Kumari, wind pipe was found to be pressed, ecchymosis was present, clotted blood was also present and the doctor has opined that asphyxia due to throttling resulted in the death of Sonu Kumari. Both the accused persons remained silent, they did not offer any explanation as to how Sonu Kumari sustained injuries and met with homicidal death. On the contrary, Dilraj Kumari & Ramprasad raised false plea that in the fateful night Ramprasad was on his duty in the Nursery of Forest Department whereas, in fact he was in the room and even when the room was opened, accused Ramprasad was present in the room, rather he himself opened the door of the room.

28. All the above facts and circumstances are suggestive of the fact that the accused/appellants are the real culprits of the crime in question. It can safely be inferred from the above facts and circumstances that both the accused persons were sharing common intention with each other to commit the murder of Sonu Kumari. Being stepdaughter Sonu Kumari was not liked by Dilraj Kumari, that is why Dilraj Kumari used to beat Sonu Kumari. Therefore, we are of the considered opinion that the trial Court has rightly convicted the accused persons with the aid of Section 34 of the I.P.C. for committing the murder of Sonu Kumari.

29. In the result, we do not find any illegality or infirmity in the judgment of the trail Court, the appeal, being devoid of merit, is liable to be dismissed and it is hereby dismissed.

Sd/-
L.C.BHADOO
Judge

Sd/-
Sunil Kumar Sinha
Judge
01-10-2007

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